IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 12, 2005

STATE OF TENNESSEE v. FRANK A. ARMSTRONG, JR.

Direct Appeal from the Circuit Court for Maury County
No. 12816 Robert L. Jones, Judge

No. M2004-01728-CCA-R3-CD - Filed August 16, 2005

The defendant, Frank A. Armstrong, Jr., was originally indicted for first degree premeditated murder but was convicted of second degree murder. The defendant was sentenced as a Range I, standard, violent offender, to twenty years. On appeal, the defendant alleges error by the trial court in: (1) failing to grant relief for the State's failure to preserve evidence; (2) refusing to suppress the defendant's blood analysis; (3) failing to excuse five jurors for cause; and (4) that the State failed to negate the defendant's theory of self defense beyond a reasonable doubt. After review, we affirm the trial court's judgment of conviction.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Claudia S. Jack, District Public Defender, and Shipp R. Weems, Assistant Public Defender, for the appellant, Frank A. Armstrong, Jr.

Paul G. Summers, Attorney General and Reporter; Seth P. Kestner, Assistant Attorney General; T. Michel Bottoms, District Attorney General; and Lawrence R. Nickell, Jr., and Brent A. Cooper, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant, Frank A. Armstrong, Jr., was indicted for first degree premeditated murder of the victim, William Darren Sawyer. The defendant was convicted by a jury of the lesser included offense of second degree murder (a Class A felony) and was sentenced to twenty years incarceration as a Range I, standard, violent offender. The defendant timely appeals four issues, alleging that the trial court erred: (1) in failing to grant relief for the State's failure to preserve evidence; (2) in refusing to suppress the defendant's blood analysis; (3) in failing to excuse five jurors for cause; and

(4) that the State failed to negate the defendant's theory of self defense beyond a reasonable doubt. We conclude that no reversible error occurred and affirm the judgment from the trial court.

Factual Background

The victim was killed on October 31, 2001, at the defendant's residence at Rivervilla Apartments in Columbia. Randall Gray lived in the apartment adjoining the defendant's apartment. Gray testified that he saw the defendant at the apartment complex about 4:30 p.m. that day. Between 7:30 and 9:30 p.m., Gray heard people coming to and going from the defendant's apartment. At approximately 9:30 or 10:00 p.m., he heard noises that sounded like a struggle. He heard a voice say, "stop Frank, stop Frank," then a gunshot. The fighting resumed, and he then heard another gunshot, followed by the defendant saying, "get up m-f, get up, get up m-f get up." Gray observed the defendant walking away toward other apartments. He also heard moans from the defendant's apartment.

Quinton Johnson also lived in the Rivervilla Apartments. He testified that the defendant had called him on October 31, 2001, wanting to buy crack cocaine. Johnson delivered the cocaine and saw the victim in the defendant's apartment. He did not see any evidence of hostility between the victim and the defendant. Later that night, the defendant knocked at Johnson's door and had blood on him. The defendant said, "I have done shot and killed someone," then requested Johnson to take him to the defendant's father's home. Johnson refused and shut the door.

Randall Wilson stated that he went to the Rivervilla Apartments at approximately 9:00 p.m. on October 31, 2001. The defendant approached him and told Wilson that he may have killed someone. The defendant had blood on his shirt and pants.

Janice Sawyer was the ex-wife of the victim. On the day of the victim's death, she received three voice mail messages from him. Two messages contained only background noises but the third, at 9:47 p.m., recorded the sounds at the time of the shooting. According to the testimony, she first heard a voice say, "hey man, what are you doing with my stuff?" The same voice mail said, "put my wallet down" and next said, "take my coat off." She heard the victim respond negatively by saying, "huh-uh." This was followed by scuffling noise, moving of furniture, slapping, and punching sounds. After a gunshot sound, the victim said, "I've hurt my hand, I'm dying. Frank, stop, stop, I'm through man." A second gunshot was then fired. Later the victim said, "I'm sorry babe. I love you." Ms. Sawyer learned of the victim's death the next day and reported the voice mail to Paul Peters, a Columbia policeman, then temporarily working in the detective division. Officer Peters listened to the voice mail and was also furnished the phone's access code whereby the message could be reached from another phone. The voice mail was deleted after two weeks by Ms. Sawyer's phone service provider.

Columbia police officer, Jeffrey Dooley, along with his partner, were the first officers at the crime scene. Officer Dooley saw the defendant stumbling between two buildings and described the defendant as "distraught." The officer saw the victim's body at the foot of the bed. No weapon was

observed around the victim. The interior of the defendant's apartment was cluttered as if a scuffle had occurred.

Officer Vincent Morgan observed the defendant's apartment. He described seeing an overturned table, a broken chair, and items scattered on the floor. He concluded that some disturbance had occurred.

Another officer, Vincent Ehret, said the defendant approached the officer's car upon its arrival. The defendant was covered in blood. The defendant said that someone had burst in, said "trick or treat," and pulled a gun. The defendant wrestled the man and shot him during the fight. The defendant told Officer Ehret that he did not know where the gun was located. Officer Andre Martin, who was with Officer Ehret, said he heard the defendant say he had thrown the gun in some bushes.

Detective Michelle Mason went to the crime scene and observed that there had been a fight. She said the jacket worn by the victim had two holes in the back, one in the upper middle and the other in the lower left side. Detective Mason attended the victim's autopsy. She stated that there were abrasions to the victim's face and two wounds in his back; one just below the neck area on the left side, the other in the left lower shoulder blade area.

Detective Mason spoke with the defendant on the night of the shooting. She said the defendant consented to a blood test, and he was transported to the hospital for that purpose.

Detective Mason testified that she listened to the voice mail message on Ms. Sawyer's phone three or four times. She heard a lot of scuffling and movement, then a voice saying, "give me my wallet," and another voice answering negatively. Next, she heard, "give me my jacket," and another negative reply. More scuffling ensued, then a gunshot followed by more scuffling and another gunshot. Detective Mason said she did not hear any words to the effect of, "I've hurt my hand," "I'm dying, Frank, stop," or "I'm sorry babe, I love you."

Nine-year-old Sean Finley testified that he found a pistol on 6th Avenue in Columbia. The pistol was in a gutter in plain view. Lieutenant Bobby Haywood questioned Finley concerning the gun and was shown where it was found. The site was one to two miles from Rivervilla Apartments. The date of Finley's discovery was November 27, 2001. Later DNA tests showed that blood on the gun was that of the victim.

Dr. Charles Harlan, a forensic pathologist, testified concerning the autopsy he performed on the victim. He described finding that the victim suffered lacerations on the head, scalp, forehead, and nose areas. There were two areas of depressed skull fractures and two gunshot entry wounds in the victim's back. He concluded that death was caused by blood loss from the gunshot wounds and stated that death would have occurred within five to ten minutes without medical attention. The victim's blood contained alcohol and cocaine.

Officer Joey Gideon, with the evidence collection unit, testified concerning evidence collected at and near the crime scene. He stated that he observed no injuries on the defendant.

Glenn Nelson, owner of a store in front of Rivervilla Apartments, testified to finding the victim's wallet under a garbage can at the store.

Paul Peters stated that he was temporarily assigned to the Columbia detective unit at the time of the shooting. He was the first officer contacted by Ms. Sawyer regarding the voice mail message. Officer Peters made no contemporaneous written report on the message but did compile a report some eight months later. He recalled hearing scuffling or a fight. He heard two to three gunshots and a voice say, "stop, Frank, stop." Another voice said, "give me my coat." Officer Peters stated that he did not hear the phrases: "I'm sorry babe, I love you;" I've hurt my hand;" or "I'm dying."

The defendant testified and stated that he arrived home from work at 4:00 p.m. on October 31, 2001. The victim knocked on the door and said, "trick or treat." The victim wished to buy drugs. The defendant called Quinton Johnson, who came over and sold the victim drugs. The defendant, upon returning from the bathroom, saw the victim picking up the defendant's personal items on the dresser. The defendant warned the victim that he would have to leave if he persisted. The victim wanted to buy more drugs, and the defendant called Donny Wilson, who came and sold the victim more drugs. The victim continued smoking the drugs, and the defendant asked him to leave. The victim became belligerent. The victim had put on the defendant's coat and taken his billfold from the dresser. The defendant told the victim to return the billfold and take off the coat, and the victim answered negatively to both demands. The two men began pushing and shoving and then fighting. A gun fell from the victim's clothing, and the defendant grabbed it. The defendant hit the victim on the head with the barrel and then fired the gun. The victim continued to fight, and the defendant sidestepped him and shot again. The victim fell to the floor and started moaning. The defendant walked to a phone booth and called 911. He returned to the apartment and called 911 again, using his cell phone.

Loss of Evidence

In his first issue, the defendant alleges that the trial court erred in failing to grant the defendant any relief for the loss of evidence by the State. The evidence in question was the voice mail message recorded on the phone belonging to the victim's ex-wife. The message contained sounds of the struggle between the victim and the defendant, their voices, and the gunshots. The ex-wife, Janice Sawyer, promptly reported the message to the Columbia police. At least two officers, Paul Peters and Michelle Mason, listened to the recording numerous times. Jim Matthews, the investigator for the District Attorney's office, faxed a subpoena to the phone service provider. This record reveals no further efforts to follow up or insure that the recording was preserved. No effort was made by the State to contact the TBI for technical assistance in recording the message. Subsequently, within ten to fourteen days, the message was purged in the routine course of business by the service provider and was forever lost. The officers who listened to the recording did not make contemporaneous notes or a report on the contents.

In State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), our Supreme Court addressed the factors which should determine the consequences resulting from the State's loss or destruction of evidence which the accused contends would be exculpatory. The Court articulated an analysis based on the central question of "[w]hether a trial conducted without the destroyed [or lost] evidence would be fundamentally fair." Id. at 914. The due process principles of the Tennessee constitution require that the State's failure to preserve evidence which could be favorable to the defendant is evaluated in the context of the entire record. Id. at 916-17. If there exists a duty to preserve the evidence, a reviewing court must conduct a balancing test based upon the following factors:

(1) the degree of negligence involved;

(2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and

(3) the sufficiency of the remaining evidence against the defendant.

Id. at 917. If it is determined that a trial without the lost or destroyed evidence would be fundamentally unfair, the trial court may dismiss the charges, craft appropriate orders to protect the defendant's rights or provide a jury instruction.[1] Id.

In overruling the defendant's motion to dismiss the indictment, the trial court found the State's negligence to be "very small," the probative value insignificant and possibly prejudicial to both the State and the defendant, with no bad faith on the part of the State officers.

The defendant's defense was that of self defense and defense of property. Therefore, the recording evidence was extremely probative and the State had a duty to preserve the evidence. However, we feel that the State's inadequate efforts at preservation were simple negligence, as opposed to gross negligence.

As concerns the second factor, the evidence was unquestionably significant. Recollections of what was heard almost invariably will differ with various witnesses. Obviously, the recording itself would provide the jury a more accurate rendition than the imperfect recall of listeners testifying months after the event. Still, viewing the context of the entire record, we are not convinced that the missing evidence was devastating to the defendant. Each of the three witnesses who heard the recording, testified to hearing the defendant demand that the victim return his wallet and jacket. These statements supported the defense theory. There were other discrepancies, especially between Janice Sawyer and the officers, but these were matters for the jury to weigh.

There was a fourth witness, Randall Gray, the next door neighbor, whose testimony was based on what he heard from his apartment. His testimony was not particularly helpful to the defendant but was valid evidence and not dependent on the lost evidence.

The medical proof that the victim was shot twice in the back is strong circumstantial evidence that the killing was not in self defense. In summary, we conclude that the sufficiency of the other

[1] A suggested instruction is contained at Ferguson, 2 S.W.3d at 917 n. 11.

available evidence would support the conviction for second degree murder. It is our view that the three factors under Ferguson weighed in favor of the State, and the trial did not violate fundamental fairness.

Defendant's Blood Test

The defendant asserts, as his second issue, that the trial court erred in refusing to suppress the defendant's blood test results.

This motion to suppress was heard on stipulated facts as follows: The defendant was given the Miranda warnings, first, early on November 1, 2001, and again when he was taken to the police station. The defendant exercised his rights, remained silent, and requested an attorney. Later, before the defendant was afforded counsel, he was again given the Miranda warnings when he was asked to submit to a blood test. The defendant agreed and signed a written consent form. The defendant was then transported to a hospital for medical personnel to take the blood sample.

The trial court overruled the motion to suppress the blood analysis on the grounds that the fruits of the test were non-testimonial. On appeal, the defendant argues that the request for a blood test violated the defendant's Fifth and Sixth Amendment rights under the Federal Constitution and comparable provisions in the Tennessee Constitution.

The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this court unless the evidence preponderates against them. State v. Ross, 49 S.W.3d 833, 839 (Tenn. 2001). The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001). Testimony presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on a motion to suppress. State v. Henning, 975 S.W.2d 290, 298 (Tenn. 1998). This court is not bound by the trial court's conclusions of law. State v. Randolph, 74 S.W.3d 330, 333 (Tenn. 2002). The application of law to the facts found by the trial court are questions of law that this court reviews *de novo*. State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000).

In State v. Walton, 41 S.W.3d 75, (Tenn. 2001), our high court found that neither the United States or Tennessee Constitutions require suppression of the fruits of non-testimonial evidence in the face of a Miranda violation, unless the consent was coerced. Id. at 90-91.

As stated before, the motion to suppress was heard on stipulated facts. The evidence that the defendant's blood analysis was positive for cocaine and negative for alcohol was entered by stipulation. There is no evidence in the record to show coercion of the defendant or anything other than a voluntary consent to submit to the blood sample after a repetitive advisement of his rights.

We note that the results of the blood test are of scant significance to the issues at trial and conclude that had it been error, it was harmless.

Juror Disqualification

The defendant's third issue alleges that the trial court erred in refusing to excuse for cause five jurors who had preconceived opinions concerning the facts involved at trial. The defendant's brief names five jurors and their responses during voir dire that purports to demonstrate reasons for their disqualification for cause. Although the defendant's brief makes reference to the record, it is erroneous, and no transcript of the voir dire is included in the record.

It is the duty of an accused seeking appellate review to provide a record which conveys a fair, accurate, and complete account of what transpired with regard to the issues which form the basis of the appeal. Tenn. R. App. P. 24(b); see State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999). The failure to include a transcript of the voir dire proceedings precludes our review, and this issue is waived.

Sufficiency

The defendant's fourth and final issue asserts that the State failed to negate beyond a reasonable doubt the defendant's theory of self defense. The defendant did assert self defense during the trial, and the jury was instructed that the State must negate the contention beyond a reasonable doubt. This issue is essentially a challenge to the sufficiency of the evidence to support the conviction of the defendant for second degree murder.

The proper inquiry for an appellate court reviewing a challenge to the sufficiency of the evidence to support a conviction is whether, considering the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999); Tenn. R. App. P. 13(e). "A guilty verdict by the jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory." State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and this court does not reweigh or re-evaluate the evidence. Id. Nor may this court substitute its inferences from the circumstantial evidence for those drawn by the trier of fact. See State v. Carruthers, 121 S.C. 2600, 35 S.W.3d 516, 557-58 (Tenn. 2000). A verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal, the defendant has the burden of illustrating why the evidence is insufficient to support the jury verdict. Carruthers, 35 S.W.3d at 557-58.

The defendant was convicted of second degree murder, defined as "a knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). To successfully assert a claim of self defense, a defendant must meet a threefold test: "the defendant must reasonably believe he is threatened with imminent loss of life or serious bodily injury; the danger creating the belief must be real or honestly

believed to be real at the time of the action; and the belief must be founded on reasonable grounds." Tenn. Code Ann. § 39-11-611(a) Sentencing Commission Comments.

The evidence herein showed that the victim suffered depressed skull fractures in two areas; lacerations on the head, scalp, forehead, and nose areas; and two gunshots in the back. The defendant suffered no visible injury. The victim was unarmed when he was shot.

The defendant has not demonstrated why the evidence was insufficient to support the conviction. The jury had ample reason, based on the evidence, to reject the defendant's claim of self defense and to support the conviction for second degree murder.

Conclusion

After careful review of the defendant's issues on appeal and the record as a whole, we conclude that there is no reversible error. The judgment of the trial court is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE